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No. 03-906

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD O'BRIEN,

Petitioner,

vs.

CITY OF HACKENSACK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE CITY OF HACKENSACK IN OPPOSITION

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STATEMENT OF THE CASE

1. DISCLOSURE OF O'BRIEN'S DRUG AND ALCOHOL ADDICTION IN 1994-1995

Petitioner Richard O'Brien ("O'Brien") was hired as a firefighter by Respondent City of Hackensack ("Hackensack") in 1990. In June 1994, O'Brien disclosed to Hackensack that he was experiencing problems related to excessive alcohol consumption (Pet. App. C, p. 15). In January 1995, O'Brien disclosed to Hackensack that he was experiencing problems due to substance abuse (*Id.*) At this time, Hackensack was also advised that O'Brien had appeared at the fire stations apparently under the influence of drugs and alcohol (Pet. App. A, p. 5).

After this disclosure, O'Brien submitted to a medical screening, the results of which were positive for both cocaine and marijuana (Pet. App. C, p. 15). O'Brien was then advised to provide a letter from his physician confirming his ability to return to work. After failing to provide such medical certification from his physician, O'Brien was advised he would be terminated if no such certification was received. (*Id.*)

On February 26, 1995, having received no such certification, a disciplinary action was filed by Hackensack against O'Brien charging him with four violations: (1) chronic absenteeism; (2) abandoning of his position; (3) conduct unbecoming a public employee; and (4) insubordination (*Id.*, pp. 15-16). On March 29, 1995, a hearing on these charges was held before City Manager James S. Lacava ("Lacava") (*Id.*, p. 16). By order dated April 19, 1995, Lacava determined that O'Brien was guilty of all four charges. While Lacava determined that O'Brien's substance-abuse problems warranted his termination, he

further determined that O'Brien was a handicapped person whose condition fell within the protection of the New Jersey Law Against Discrimination. (*Id.*)

Accordingly, Lacava placed O'Brien on an involuntary leave of absence for sixty (60) days, on the condition that O'Brien participate in a drug treatment program and submit to periodic drug testing upon his return to work (*Id.*, pp. 16-17).

2. O'BRIEN'S ARREST IN JUNE 1995 FOR THEFT

On June 1, 1995, plaintiff was arrested in Englewood, New Jersey and pled guilty to a charge of attempted theft. On June 20, 1995, Hackensack filed disciplinary charges against O'Brien for conduct unbecoming a public employee based on the charge of attempted theft (Pet. App. A, p. 6). O'Brien was suspended immediately without pay (Pet. App. C, p. 17). However, in mid-July 1995, Hackensack learned that O'Brien's guilty plea had been "vacated" and the July, 1995 disciplinary hearing relating to this charge of attempted theft was adjourned until Hackensack could get further details on the status of the theft charge which, despite the guilty plea being "vacated", was still pending (Pet. App. A, p. 6).

In August 1995, additional disciplinary charges were filed by Hackensack against O'Brien charging him with failing to attend the rehabilitative program required under Lacava's April 1995 ruling (Pet. App. C, p. 17).

3. THE OCTOBER 1995 SETTLEMENT OF O'BRIEN'S ADA CLAIMS AND HIS REINSTATEMENT TO WORK

On September 5, 1995, a hearing commenced concerning the June and August 1995 charges. (*Id.*, p. 18). However, prior to completion of said hearing, the parties commenced settlement discussions to resolve all charges.

Following the September 5, 1995 hearing and prior to any settlement, O'Brien filed a claim with the EEOC alleging that Hackensack had, in violation of the Americans With Disabilities Act of 1990, 42 U.S.C. §§12101, *et seq.* ("the ADA") discriminated against him because of his disability, *i.e.* his substance abuse (*Id.*)

Ultimately, a settlement agreement was reached resolving all issues between the parties (Pet. App. A, p. 6), whereby Hackensack agreed to withdraw the charges arising from his failure to attend a rehabilitative program and also agreed to return O'Brien to work. In turn, O'Brien pled guilty to the charge of conduct unbecoming a public employee arising from his theft charges in June, 1995. O'Brien further agreed to dismiss both his appeal of the April 19, 1995 Order and his ADA claims. (*Id.*)

O'Brien further agreed that he would continue with his out-patient therapy for a period of six (6) months from his return to work in October, 1995 and that should he violate any drug or alcohol aspect of the agreement, immediate charges would be filed seeking to terminate him. In accordance with the settlement agreement, O'Brien was reinstated to duty as of October 17, 1995 (Pet. App. A., p. 6).

4. O'BRIEN'S ARREST IN DECEMBER 1995 FOR POSSESSION OF ILLEGAL DRUGS

On December 9, 1995, less than two months after returning to work, O'Brien was arrested by the Bergenfield, New Jersey police and charged with possession of marijuana (Pet. App. C, p. 18). As a result of such arrest and criminal charge, Hackensack filed disciplinary charges against O'Brien for conduct unbecoming a public employee and for insubordination for failure to abide by his earlier agreements. Hackensack suspended O'Brien without pay effective December 12, 1995, pending disposition of his criminal charges. (*Id.*) The hearing on these disciplinary charges was adjourned at O'Brien's request until the disposition of the drug charges in the Bergenfield Municipal Court.

The trial of the drug charges against O'Brien in Bergenfield Municipal Court commenced on July 25, 1996 and continued thereafter on November 5, 1996. (*Id.*) At the trial, it was stipulated that O'Brien, while operating a motor vehicle, was stopped by Bergenfield Police Officer John Casper ("Casper") on December 9, 1995 (*Id.*, p. 19).

O'Brien was placed under arrest for outstanding arrest warrants and a custodial search of O'Brien was conducted by Officer Casper. Inside O'Brien's pants, two foil packets containing a trace of a white substance were found. In O'Brien's inside jacket pocket a cigarette box was found containing two burnt marijuana cigarettes. (*Id.*) At the time the foil packets with the white powdery substance were found, O'Brien began to struggle with Casper and, with the help of a second police officer, O'Brien was subdued. It was at this point that the marijuana was discovered. O'Brien's fiancée, who was a passenger in the car at the

time of the arrest, testified that prior to the arrest (1) she was not aware of the cigarette box or the marijuana being in the jacket and (2) that the jacket in which the drugs were found by the police belonged to O'Brien (Ja 225).

After O'Brien was subdued and the above items recovered, O'Brien accused Officer Casper of planting the drugs on him and alleged that he did not know where the drugs came from (Ja 216). The seized items were then packaged and labeled for identification. The laboratory test conducted on the seized items were positive for both marijuana and cocaine [1] (Ja 222).

At the continuation of the trial on November 5, 1996, the Municipal Court denied O'Brien's motion to suppress the laboratory test results of the seized items (Ja 219-221). No appeal was taken from the denial of said motion to suppress and O'Brien has never contested the results of these laboratory tests.

At the conclusion of O'Brien's defense in the Bergenfield Municipal Court, O'Brien requested that the Court withhold its decision and allow him time to decide whether he wished to apply for a conditional discharge under a New Jersey law which would, after agreement by O'Brien to supervised treatment, result in the dismissal of the charges. *See N.J.S.A.* 2C:36A-1. O'Brien did apply for such program and in early December 1996, the drug charges against O'Brien were conditionally dismissed, *without an adjudication of his guilt or innocence* (Pet. App. C, p. 19).

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[1] While the laboratory results were positive for cocaine, O'Brien was only charged with possession of marijuana.

The criminal action having been completed, Hackensack scheduled a hearing on the December 1995 disciplinary charges. At the hearing, at which O'Brien was represented by counsel, the above facts were presented in the form of testimonial and documentary evidence. Thereafter, by written opinion dated May 14, 1997, Lacava rejected O'Brien's contention that he was not afforded a timely hearing and denied O'Brien's application to dismiss the disciplinary charges arising from his drug possession. (*Id.*)

Regarding the charges of conduct unbecoming a public employee, Lacava noted that "the proof of O'Brien's guilt is overwhelming." (Ja 234). Lacava further found that O'Brien had failed to complete his out patient therapy as required (Pet. App. A, p. 7).

Based on the above, Lacava terminated O'Brien's employment. In ruling that the circumstances in this case made termination both necessary and appropriate, Lacava stated:

> A public employee serving as a firefighter is entrusted daily with the personal safety of the citizens he serves and his fellow firefighters. The past history of Firefighter O'Brien's disciplinary problems and drug abuse, while tragic, are undisputed. The City has met its legal responsibilities over this period of time, to proactively, and with the expenditure of significant public funds, assist Firefighter O'Brien on the path of rehabilitation. This has not been successful. The fact that sixty (60) days after returning to work (after a seven month period of suspension/leave of absence due to a drug abuse problem), Firefighter O'Brien is again found to be in possession of a

> controlled dangerous substance, speaks volumes on the seriousness of this situation.

(Pet. App. C., pp. 19-20).

After his termination, O'Brien filed an administrative complaint with the EEOC. Thereafter, O'Brien filed the complaint in this matter alleging claims only under the ADA, the Rehabilitation Act, 29 U.S.C. §§796 *et seq.* and the Privacy Act, 5 U.S.C. §§551-552. O'Brien appeals to this Court only from the dismissal of the dismissal of the ADA claims.

Hackensack filed for summary judgment seeking dismissal of all of O'Brien's claims. In granting said motion, the District Court held that, under the *McDonnell Douglas* analysis, O'Brien was unable to establish a prima facie case of discrimination under the ADA (Pet. App. C, p. 24). In particular, the District Court found that (1) by virtue of his continuing use of drugs and pursuant to 42 U.S.C. §12114(a), O'Brien was not "a qualified individual with a disability," and (2) O'Brien was not terminated because of his disability but rather because of (i) his conduct (drug possession) unbecoming a public employee and (ii) his insubordination (Pet. App. C, pp. 26-27).

On appeal from the judgment of the District Court, the Third Circuit Court of Appeals, citing to *Salley v. Circuit City, Inc.*, 160 F.3d 977 (3rd Cir. 1998), affirmed the dismissal of O'Brien's complaint in its entirety, holding that (1) O'Brien was properly terminated under *N.J.A.C.* 4A:2-2.3(a)(6), which permits public employees to be disciplined for conduct unbecoming a public employee and (2) drug possession was plainly "unbecoming conduct" (Pet. App. A, p. 8).

SUMMARY OF THE ARGUMENT

1. The first question presented in the Petition should be denied, first, because no basis exists to overturn the analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny for deciding claims under the ADA. No Court of Appeals has adopted such a position and no division among them exists on this point. The *McDonnell Douglas* framework was not replaced or overturned by this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), nor has any Court of Appeals so held.

Second, even if O'Brien's ADA claim was analyzed under the (different) standard he alleges was established in *Aikens*, summary judgment dismissing his claims would still be appropriate because no evidence of discrimination by Hackensack exists. Therefore, this Court's granting of the Petition and adoption of O'Brien's alternate analytical standard would not serve as a basis to reverse or vacate the summary judgment entered below.

2. The second question presented by the Petition should be denied first, because O'Brien never affirmatively asserted any due process claim below and no such claim was ever considered or decided by either the District Court or the Court of Appeals. Said claim is therefore waived. Second, such due process claim, even if asserted as alleged evidence of discriminatory intent, fails on its merits because O'Brien was afforded a timely hearing at which he was given a full and fair opportunity to contest the charges against him.

Finally, the penalty of termination of O'Brien's employment was appropriate under New Jersey state law for his possession of drugs.

REASONS FOR DENYING THE PETITION

I.

NO BASIS EXISTS FOR THIS COURT TO ABANDON THE ANALYTICAL FRAMEWORK ESTABLISHED IN *McDONNELL DOUGLAS* AND ITS PROGENY

From a reading of the first part of Question 1, it is difficult to understand exactly what issue O'Brien is requesting this Court to decide. This question appears to request that the Court decide, in light of its decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), what evidence, if any, must be proffered by an employee to establish liability under the ADA if the reasons asserted by the employer are false and pretextual?

It is doubtful whether this is, in fact, the issue O'Brien is asking this Court to decide. Such doubt is based on (1) Hackensack's belief that the issue decided in *Reeves* does not directly address this well-settled standard and (2) the fact that the body of O'Brien's Petition reflects a different, but more well-defined question. More particularly, O'Brien argues at pp. 8-12 of his Petition that the framework set forth in *McDonnell Douglas* and its progeny to address discriminatory treatment claims under the ADA should be rejected in place of a single question as to whether the employer's reason for an employee's termination was discriminatory.

This Court should not grant certification as to this issue because (1) no conflict exists among the Circuit Courts on this issue nor is there any basis under Supreme Court Rule 10, or otherwise, to grant certification; and (2) the position advocated by O'Brien on this issue would not affect the ruling in this case below by the Third Circuit.

A. No Conflict Exists Among the Circuit Courts Regarding the Appropriateness of the *McDonnell Douglas* Analytical Framework

While O'Brien urges the Court to "revisit" *Reeves* for the purpose of rejecting the *McDonnell Douglas* analytical framework, such revisiting is inappropriate insofar as the issue before the *Reeves* Court did not address such question. Rather, *Reeves* simply resolved a conflict among the Courts of Appeals in deciding that

> a Plaintiff's *prima facie* case of discrimination, combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves, 530 U.S. at 140. Therefore, a revisiting of the issue addressed by *Reeves* will not further O'Brien's request that this Court abandon the *McDonnell Douglas* framework.

Hackensack believes that the clearest expression of the question O'Brien desires this Court to decide is found at pp. 8 and 9 of the Petition where this Court is urged to abandon the *McDonnell Douglas* framework and adopt the

reasoning of discrimination cases which, according to O'Brien:

> ultimately focus on whether the employer's reason for termination was discriminatory . . . without going through the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and instead focus on the ultimate question of discrimination *vel non*, as pointed out by this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983).

In support of this position, O'Brien cites to the concurring opinion in *Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205 (10th Cir. 2003) (Pet. p. 8), which argues that the *McDonnell Douglas* framework creates more problems than it resolves, and suggests that this Court's decision in *Aikens* "constitutes a de facto overruling of the *McDonnell Douglas* framework." *Wells*, 325 F. 3d at 1226.

The foregoing position advocated by O'Brien is not supported by this Court's decisions in the 30 years since *McDonnell Douglas* was decided or in the 20 years since *Aikens* was decided. With respect to the continued vibrancy and usefulness of the *McDonnell Douglas* framework, this Court most recently, in *Raytheon Co. v. Hernandez*, 540 U.S. ___ (2003) (slip opinion at p. 5) in analyzing an ADA claim, recognized with approval the use of the "familiar burden-shifting approach first adopted by this Court" in *McDonnell Douglas*.

In an earlier decision, the procedural framework of *McDonnell Douglas* was acknowledged by Justice Scalia and Justice Souter in their respective majority and dissenting opinions as "a framework carefully crafted in precedents as old as 20 years." *St. Mary's Honor Center v.*

Hicks, 509 U.S. 502, 512 (1993). Justice Scalia's majority opinion in *St. Mary's*, responding to the concerns of the dissenting justices to the perceived undermining of such framework, is vigorous in its defense of the *McDonnell Douglas* framework. Therefore, contrary to O'Brien's view of the viability of *McDonnell Douglas*, this Court has consistently, without exception, upheld the utility and employment of such analytical framework.

O'Brien, however, argues that the *McDonnell Douglas* framework should be discarded in place of what he believes to be an alternative mechanism established in *Aikens* (Pet. 8). In so arguing, O'Brien again refers to the concurring opinion in *Wells*, *supra*, 325 F.3d at 1226.

Hackensack contends that any such reading of *Aikens* is erroneous. First, nothing in the opinion of *Aikens* itself supports such a position. In *Aikens,* this Court held simply that

> where the Defendant has done everything that would be required of him if the Plaintiff had properly made out a *prima facie* case, whether the Plaintiff really did so is no longer relevant.

Id. at 715. Justice Blackman, in his concurring opinion in *Aikens*, in which Justice Brennan joined, stressed the fact that the majority's opinion reaffirmed the *McDonnell Douglas* framework. *Id.* at 1483.

Subsequent to *Aikens*, the Courts of Appeal have cited to *Aikens* simply for the proposition that on review, the appellate courts need not determine whether the Plaintiff at the trial level made out a *prima facie* case if otherwise the Defendant below had done what was required of him if such *prima facie* case, in fact, had been made. *See*, *e.g.*, *Wixson v. Dowagiae Nursing Home*, 87 F.3d 164, 170 (6th

Cir. 1994); *Lindemann v. Mobil Oil*, 141 F.3d 290, 296 (7th Cir. 1998) and *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758, 762 (D.C. Cir. 2002).

Second, in the cases decided by this Court subsequent to *Aikens* in which *Aikens* is cited, no language can be found that is supportive of O'Brien's position. *See e.g. Bazemore v. Friday*, 478 U.S. 385, 398 (1986); *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986) and *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

B. Abandonment of the *McDonnell Douglas* Framework Would Not Affect the Lower Courts' Dismissal of O'Brien's Complaint

Even if this Court were to agree to O'Brien's request to abandon the *McDonnell Douglas* framework and proceed to the question of whether Hackensack improperly discriminated against him, such analysis would still result in the dismissal of O'Brien's ADA claims. The courts below both held that no facts existed to support O'Brien's allegation that he was terminated because of any disability. Specifically, the District Court found:

> In this case, O'Brien was terminated for conduct unbecoming a public employee and insubordination . . .
>
> Hackensack did not terminate O'Brien because of his disability. In fact, throughout the course of O'Brien's employment with Hackensack, the city made a number of accommodations, in an attempt to help him overcome his drug and alcohol dependency. In the end, O'Brien was terminated because his actions were found to be unbecoming a public employee . . . As a result, O'Brien cannot

establish that he was terminated because of his disability.

(Pet. App. C, p. 27)

Similarly, the Court of Appeals concluded:

> No one would reasonably conclude, on this record, that O'Brien was terminated for his addiction rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O'Brien in response to his arrest for possession of drugs, which is a permissible reason under the ADA . . .
>
> [T]ermination based on drug possession and failure to accommodate drug related misconduct are not violations of the ADA. Absent evidence that the employer was motivated by the employee's status, as opposed to mere drug use or possession, there can be no ADA discrimination claim. O'Brien has not demonstrated that the actions of the City were motivated by his status, rather than by his drug possession. Only when he was arrested for his drug possession was he terminated. After showing some tolerance for O'Brien's addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with *N.J.A.C.* 4A:2-2.3(a)6, which permits the discipline of public employees for "[c]onduct unbecoming a public employee." Arrest on drug possession is plainly unbecoming conduct . . .
>
> The City was not motivated by O'Brien's actual use of drugs at the time of the discharge, but by his possession of drugs and his arrest on a drug-related charge.

(Pet. App. A, pp. 8-9).

The foregoing opinions clearly demonstrate that the factual record in this case is devoid of any evidence that Hackensack terminated O'Brien based on his disability status, as opposed to his drug possession. Evidence of such causal connection is required to state a prima facie case. *See Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997); *Rizzo v. Children's World Learning Center, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999); *Gaul v. Lucent Technologies, Inc.* 134 F.3d 576, 580 (3rd Cir. 1998) and *O'Neil v. Ferguson Const. Co.*, 237 F.3d 1248, 1252 (10th Cir. 2001).

Because there is no evidence of any causal connection between O'Brien's disability (as opposed to his act of drug possession) and the termination of his employment, the District Court and Court of Appeals held no prima facie could be proven.

O'Brien attempted below to create disputed material facts regarding his attendance at drug treatment programs, Hackensack's payment for rehabilitative treatment and his actual use of the drugs at the time he was found to be in possession in December 1995 (Pet., pp. 12-14). However, while Hackensack disputes such "facts", these issues are not relevant to the critical, undisputed fact that his termination was based only on his undisputed drug possession in December 1995.

The foregoing record reflects that regardless of whether the *McDonnell Douglas* framework, or the alternative framework advocated by O'Brien, is utilized, there are no facts upon which a reasonable person could conclude that O'Brien was terminated as a result of his disability status rather than his drug possession. Therefore, even if

this Court were to abandon the 30 years of precedent following *McDonnell Douglas*, such abandonment would not change the conclusion that no violation of the ADA occurred. Accordingly, the Petition should be denied.

O'Brien also asks this Court to decide as part of his first question presented, "should the employer have to prove the specific reasons relied upon as the basis for termination?" (Pet., p. i). Such question is not relevant to the disposition of this case as presented to this Court. The Courts below concluded that the record showed no evidence of discriminatory intent by Hackensack. Under either the *McDonnell Douglas* analysis or the analysis advocated by O'Brien the burden of proving discriminatory intent always remains with the plaintiff. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under *McDonnell Douglas*, plaintiff bears the burden of showing discriminatory intent as part of his prima facie case. *See Holbrook* and *Rizzo*, *supra*. If he fails to do so, the employer is not required to prove the non-discriminatory reasons for the termination. Even under the alternate framework suggested by O'Brien, the employee still has the burden of proving discriminatory intent; the employer's stated reasons for such termination are simply considered by the factfinder in determining whether the employee has met such burden. *See Burdine*, *supra*.

Therefore, the question of what the employer must prove under the ADA is not germane to the disposition of this case as postured, nor is there any other reason for the Court to grant certiorari on this question.

II.

THE COURT SHOULD DENY CERTIORARI ON O'BRIEN'S DUE PROCESS CLAIMS

A. O'Brien Has Waived Any Affirmative Due Process Claim

The second question presented by O'Brien concerns his allegation that he was, without due process, deprived of his constitutionally protected property interest in his tenure as a firefighter because (1) he was not given a timely hearing before being terminated in 1997; (2) he was not given a fitness for duty hearing before being suspended without pay in 1995 following his drug arrest; and (3) the criminal trial transcript was used at his disciplinary hearing in 1997.

It is unclear if O'Brien by such question seeks to assert an affirmative due process claim as a cause of action, or whether he argues that the alleged violation of his due process rights was evidence of Hackensack's alleged discrimination which should have served to defeat Hackensack's summary judgment motion. If O'Brien is requesting this Court to grant his Petition on the basis that the Court of Appeals erred in not ordering affirmative relief under a due process claim, such request must be denied because O'Brien has waived his right to assert same.

O'Brien's complaint in this matter asserted no due process claim (Ja 33). Before the District Court, O'Brien's Final Pretrial Statement (Ja 279-282) acknowledged that he understood "that he is precluded from offering at trial any claims . . . which have not been disclosed in this submission" (Ja 279). Despite such acknowledgment, no

due process claim was in any way referenced in his Final Pretrial Statement.

In his response to Hackensack's summary judgment motion, O'Brien filed a cross motion for partial summary judgment solely for a declaration that he was a "qualified individual under the ADA." In his brief in opposition to Hackensack's summary judgment motion and in support of such cross motion, passing reference is made to O'Brien's due process rights *not in support of any affirmative claim for damages or relief* but solely as alleged evidence of Hackensack's discriminatory intent. For this reason, Hackensack had no reason to, and did not, engage in any discussion of such affirmative due process claim in its reply papers to the District Court.

More importantly, the District Court's opinion (Pet. App. C, pp. 13-28) makes no reference to and makes no ruling on any such claim by O'Brien. The only logical reason for this is simply that the District Court did not, and had no reason to, recognize such an affirmative claim being made. Accordingly, any affirmative due process claim which O'Brien now requests this Court to adjudicate was never presented to or decided by the District Court.

Similarly, no reference was made to any due process claim in O'Brien's Notice of Appeal to the Court of Appeals (Ja 24-26). While the Notice of Appeal specifically delineated five bases for his appeal from the District Court judgment, no reference to an appeal from any due process claim is mentioned. Further, in O'Brien's forty-one page moving brief filed with the Court of Appeals, not one reference to any due process claim was made. In light of such fact, and absent any such claims before the District

Court, Hackensack did not address any such claim in its opposition brief filed with the Court of Appeals.

It was only in his reply brief to the Court of Appeals that O'Brien, for the first time before that Court, alleged he was not afforded due process by Hackensack. Because such issue was only first raised in O'Brien's reply brief, and because there was no oral argument before the Third Circuit, Hackensack had no opportunity to address same. However, again, O'Brien raised such issue in support of his contention that disputed facts existed regarding Hackensack's intent. The relief sought by O'Brien in his appeal to the Court of Appeals makes no reference whatsoever to any affirmative claim for relief based on denial of due process. Given the foregoing history, it is not surprising that the opinion of the Court of Appeals makes no reference to any affirmative due process claim.

Finally, at no time below did O'Brien ever state that a due process claim under the United States Constitution was a basis for the federal courts' subject matter jurisdiction in this matter, and O'Brien's Petition makes no such reference in the "Constitutional and Statutory Provision Involved" in this case (Pet., p. 1).

It is well-settled that, absent exceptional circumstances, this Court does not address claims that were neither "pressed nor passed upon below." *See United States v. Williams*, 504 U.S. 36, 40 (1992) and *United States v. Alvarez-Sanchez*, 511 U.S. 358, 360 (1994). O'Brien has articulated no such exceptional circumstances and none exist.

In his Petition, O'Brien argues for the first time an affirmative due process claim which was never the subject of legal argument or consideration by the District Court or

the Court of Appeals.[2] Having so waived such claims, it is patently unfair to now ask Hackensack to respond to such claims.[3]

This Court has also held that it will not decide an issue upon which the lower courts did not pass, *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470 (1999), nor "address arguments that were not the basis for the decision below." *Matsushita Electric Indus. Co. Ltd. v. Epstein*, 516 U.S. 365, 379, fn.5 (1996). Because the lower courts in this case neither considered nor decided any affirmative due process claim, the Court should not grant O'Brien's Petition on this question.

B. Any Claim of Lack of Due Process is Without Merit

Whether viewed as an affirmative claim for relief or as alleged evidence of discriminatory intent by Hackensack, O'Brien's allegation of lack of due process is without merit.

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[2] O'Brien did pursue an appeal from his termination both administratively and before the state court of New Jersey, alleging, *inter alia*, a violation of his right to a timely hearing. However, New Jersey's Merit System Board and the Appellate Division of the Superior Court of New Jersey both denied such appeal as untimely. Thereafter, O'Brien's Petition for Certification to the New Jersey Supreme Court from the Appellate Division's dismissal of his claim was denied. *O'Brien v. Hackensack*, 167 N.J. 89, 269 A.2d 1051 (2001). No appeal to the federal courts was taken from decision of the New Jersey courts. Having pursued such claims in the state court, O'Brien is precluded from doing so at this time.

[3] Reflective of such unfairness is O'Brien's reference to the transcript of the March 27, 1997 hearing. Said transcript was never introduced in any manner below and has never been part of the record in this case. Hackensack objects to its use at this time.

O'Brien was terminated only after a hearing was conducted as required by *N.J.A.C.* 4A:2-2.6.[4] O'Brien was given notice of the hearing and personally attended same. Further, O'Brien was represented by independent counsel of his own choice at the hearing and was afforded the opportunity to present any witness to testify on his behalf.

O'Brien argues he was not afforded due process because (1) the transcript from the criminal trial was introduced at the March 27, 1997 disciplinary hearing (Pet., pp. 17-19); (2) he was not given a timely hearing and (3) he was improperly suspended pending disposition of the criminal charges. As to the first point, it is entirely appropriate under New Jersey State law to introduce at the disciplinary hearing the prior testimony of O'Brien given at the criminal hearing.[5] Further, the transcript of Officer Casper's testimony at the criminal hearing was properly introduced at the March 27, 1996 disciplinary hearing. O'Brien and his attorney were present at the criminal hearing and were afforded every opportunity to cross-examine Officer Casper on the very issue of drug possession at issue in the disciplinary charges. The record is clear that the disciplinary hearing officer reviewed the entire transcript, including all questions posed to Casper on cross-examination by O'Brien's counsel (Pet., p. 17).

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[4] The provisions of *N.J.A.C.* 4A:2-2.6 are set forth at page 17 of the Petition.

[5] New Jersey Rule of Evidence 803(b)(1) provides in relevant part that: "The following statements are not excluded by the hearsay rule: . . . (b) A statement offered against a party which is (1) the party's own statement . . ."

O'Brien's claim that he was not given a timely hearing under *N.J.A.C.* 4A:2-2.7 and *N.J.A.C.* 4A:2-2.5 is also without merit. *N.J.A.C.* 4A:2-2.7 entitled O'Brien to an immediate hearing "limited to the issue of whether the public interest would best be served by suspending the employee until the disposition of the" drug charges. However, following his arrest for drugs in December 1995, Hackensack agreed to *O'Brien's request* that the January 3, 1996 hearing be adjourned until disposition of the criminal charges (Pet., p. 20). Almost one year later, in late November 1996, Hackensack was advised by O'Brien's union representatives that the criminal proceedings had concluded. However, no details regarding the disposition of said charges were provided. Hackensack therefore ordered the trial transcript, and as soon as it was received, Hackensack immediately set a hearing for March 1997. Accordingly, following O'Brien's request to delay the hearing for almost one year, Hackensack then afforded O'Brien a timely hearing.

O'Brien argues that he was improperly suspended pending the disciplinary hearing on his termination. Such claim is unfounded. *N.J.A.C.* 4A:2-2.5(a)(1) provides that:

> 1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

In light of O'Brien's admitted substance abuse in early 1995, Hackensack's only responsible course of action was to suspend O'Brien when it learned of his arrest for drug possession in December 1995. As a firefighter, O'Brien was

entrusted with health and safety of Hackensack's citizens, and his fellow firefighters. This trust and duty could not be compromised by O'Brien's drug dependency. Against the backdrop of O'Brien's admitted drug use/dependency and his subsequent possession of drugs following rehabilitative efforts, the danger to Hackensack's citizens and firefighters clearly warranted O'Brien's immediate suspension under *N.J.A.C.* 2A:2-2.5(a)(1). Contrary to O'Brien's argument (Pet., p. 20) no "fitness for duty exam" was required. The three grounds for immediate suspension under *N.J.A.C.* 4A:2-2.5(a)(1) are set forth in the disjunctive. Hackensack's determination that O'Brien's immediate suspension was necessary for "the safety, health, order or effective direction of public services", was by itself a sufficient basis for its action.

O'Brien also argues (Pet., pp. 15-17) that under New Jersey law his termination was an inappropriate penalty for his drug possession and that somehow such termination is therefore a disputed fact which should have precluded summary judgment. However, whether or not such termination was an appropriate penalty is not an issue properly before this Court. As noted herein below at footnote 2, such argument was unsuccessfully pursued by O'Brien through New Jersey's state courts.

Further, O'Brien's legal argument in this respect is erroneous. Under the facts of this case, New Jersey law holds that termination of public employment for drug use/possession is entirely appropriate – particularly when concerning employees directly entrusted with the safety and welfare of the public. In *Matter of Cahill*, 245 N.J. Super. 397, 400-401, 585 A.2d 977 (App. Div. 1991) the Court was presented with facts on point with the present case. In *Cahill*, the plaintiff/firefighter was found to be an

alcoholic and drug dependent. Following this initial revelation to his employer, Cahill was suspended for six months and given the opportunity to rehabilitate himself. Approximately 18 months after being reinstated, Cahill was found to be using drugs again. The Appellate Division agreed with the Merit Board that Cahill was a handicapped person within the meaning of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* – a law analogous to and interpreted the same as the ADA. *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61 (3rd Cir. 1996). The Appellate Division, however, found that Cahill was nevertheless properly terminated after having been given one opportunity to rehabilitate himself:

> Cahill is a firefighter. The Merit System Board found that "the negligent or improper performance of that function can result in serious harm to persons and property." We see no reason to challenge that conclusion, obvious to anyone even superficially familiar with the perils inherent in the performance of a firefighter's duties . . . .
>
> Cahill emphasizes that his on-duty performance was exemplary during his fourteen years of employment with the city. The employer is not required to assume-or hope-that the employee will limit alcohol and other drug consumption to off duty hours, or that the effect of drugs will be dissipated by the time the workday begins. Moreover, a firefighter is subject to being called to duty when needed, anytime of the day or night . . . . A firefighter under the influence of drugs cannot do the job . . . .
>
> There is merit to his position that where feasible an employer should afford an opportunity for

> rehabilitation to an employee handicapped by substance abuse [cites omitted]. But Cahill had his chance at rehabilitation . . . Refusal to continue employment of a handicapped person is lawful where employment in a particular position would be hazardous to that individual or to others.

Cahill, supra, 245 N.J. Super. at 400-401.

Under *Cahill*, once a firefighter is given a chance to rehabilitate himself and thereafter continues his involvement with drugs, termination is entirely appropriate. Likewise, under any reasonable standard of due regard for public safety, Hackensack, having already accommodated O'Brien, in April 1995 and again in October 1995, was not required to hope or assume that O'Brien was not using drugs *despite his undisputed possession of same in December 1995* while supposedly continuing his rehabilitation.

In support of his position, O'Brien cites to the administrative decision in *Register v. Lloyd McCorkle Training School*, 92 N.J.A.R. 2d 697 (1992). In *Register*, the employee had voluntarily entered and successfully completed a substance abuse program. Upon learning of the employee's substance abuse, his employer terminated him from conduct unbecoming a public employee.

On appeal, the Merit System Board reinstated the employee to his position based on the fact that it was his *first* involvement with drugs. The Merit System Board also ruled that termination was inappropriate because the employee "*successfully completed the program and there was no evidence of subsequent drug use.*" *Id.* (emphasis added). Termination was ruled inappropriate because "the disciplinary charge of conduct unbecoming a public

employee did not arise from the employee's use, *possession or distribution of a drug on or off-duty.*" *Id.* (emphasis added).

In the present case, unlike in *Register*, O'Brien had already been given two opportunities at rehabilitation prior to the CDS possession which caused his termination. Moreover, *Cahill* and *Register* make it clear that under New Jersey law, once an employee has been given an opportunity for rehabilitation, his subsequent possession of a drug, on or off duty, warrants his termination.

The other administrative decision cited by O'Brien, *Troutman v. East Jersey State Prison*, 93 N.J.A.R. 2d 710 (CVS, 1993) is further supportive of Hackensack's action. In *Troutman*, the employee was terminated from his position for drug possession/use found to be conduct unbecoming a public employee. Despite the employee's denial of drug use or possession, and despite the fact the criminal charge of drug possession was dropped, the administrative judge found that the employee had been in possession of marijuana.

While recognizing the employee's prior unblemished work record as well as the concept of "progressive discipline", the Judge nevertheless

> Reject[ed] appellant's argument that the disposition of the administrative charges should be similar to the criminal charges . . . [W]here the conduct of a public employee forms the basis for disciplinary proceedings and also is a violation of the criminal law, failure to convict on a criminal charge bars neither discipline nor finding of guilt for misconduct in an administrative proceeding. *Sabia v. Elizabeth*, 132 N.J. Super. 6 [331 A.2d 620] (App. Div. 1975).

The foregoing opinion confirms that the termination of O'Brien's employment for drug possession was appropriate, irrespective of the fact that the criminal charges arising from such possession were resolved by the Municipal Court without reaching a determination as to his innocence or guilt on such charges.

Finally, contrary to O'Brien's argument (Pet., p. 21), the conduct of the termination hearing and its findings are not put into dispute simply because O'Brien alleges he "sought rehabilitation". As found by the courts below, the opportunities afforded O'Brien by Hackensack, including his right to a hearing, cannot be considered by any reasonable person to be either direct or circumstantial evidence of discrimination.

The simple fact remains that in December 1995, O'Brien, despite his acknowledged past drug use, possession and addiction, was again in possession of drugs. As was found by the courts below, Hackensack, responsible for the safety and welfare of its citizens, properly and lawfully terminated O'Brien as a firefighter not because of any disability but because his drug possession, coming on the heels of his prior suspension for admitted drug abuse, constituted conduct unbecoming a public employee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied in its entirety.

Respectfully submitted,

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